

# Ruling shifts water discharge permits to EPA

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A new federal appeals court ruling strips Arizona of its authority to issue water discharge permits, a move that an attorney for home builders said could paralyze development in the state.

In a divided ruling Monday, the 9th U.S. Circuit Court of Appeals said it was a mistake for the U.S. Environmental Protection Agency in 2002 to cede its authority to issues these permits to the state Department of Environmental Quality. The court agreed with environmental groups that the action failed to consider the effect of giving that responsibility to the state would have on endangered and protected species.

The decision, unless overturned, removes the authority of DEQ to issue any more permits for water discharge. That mainly affects the more than 20,000 general permits issued every year every time a developer wants to bulldoze property in any way that it will affect storm water runoff.

But DEQ Director Steve Owens said the decision may also invalidate permits already issued by his agency for projects already underway. That would be based on the court's decision that EPA acted illegally in letting the state deal with the issue.

"We could have a number of projects just stop," said Norman James, a Phoenix attorney for the National Association of Home Builders.

He said the decision means the state can't issue the permits which are necessary for any project of at least an acre. But James

said there no longer is any authority for the EPA to issue those general permits in Arizona.

James said he intends to appeal the decision.

Monday's ruling is a big victory for two environmental groups who said Arizona state law -- and the procedures used by DEQ -- provide less protection for endangered and threatened species than federal statutes.

Owens conceded that is true. But Owens said he still believes his agency provides "adequate" protection.

Owens said if Monday's ruling holds, Arizona legislators may need to alter state law to give his agency more authority.

For example, David Hogan of the Center for Biological Diversity said California law specifically requires that permits be reviewed on a cumulative basis: Will additional development, taken together with what already is occurring, harm threatened species.

"At this point it really is a case-by-case approach on the permits," Owens acknowledged. "We don't have the authority to do a cumulative approach ... the way our statutes and regulations are written in Arizona."

That's not the only issue.

Attorney Michael Senatore of the Defenders of Wildlife said federal laws and rules require the EPA to get input from other federal agencies, like the U.S. Fish and Wildlife Service, about potential harm to species before issuing permits. But when EPA transferred its authority to DEQ in 2002, the federal agency imposed no such requirement

on the state.

Appellate Judge Marsha Berzon, who wrote Monday's majority ruling, said this is critical. She said such consultation in the past has led to measures protecting various endangered species, including the Pima pineapple cactus, the razorback sucker and the cactus ferruginous pygmy owl.

Owens said he does not believe that the lack of formal consultation with federal agencies is a big problem.

He said every time someone seeks a permit -- even a general one strictly for storm water runoff -- DEQ gives the U.S. Fish and Wildlife Service 32 business days "to see if they have any issues with the activity."

And federal agencies are specifically notified about plans for big facilities like sewage treatment plants, which require their own individual permits

"We think that what we're doing under state law does provide protections," Owens said. "But it's not the same level as the federal."

James said one legal option would be for Arizona to adopt its own Endangered Species Act with requirements similar to that of the federal law. He said that would leave the permitting authority with Arizona, something most developers consider preferable to having to deal with the EPA's regional office in San Francisco.

But James said that could provoke heartburn among developers who do not want to jump through more procedural hoops to get their project approved.